Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

LEONID DMITRUK, Administrator of the Estate of Alexander Bugaychuk, deceased; YELENA BUGAYCHUK, an individual; NATALIA MELNIK, an individual; IRINA MOROZOV, Personally and as Administrator of the Estate of Yevgeniy Morozov, deceased and as Guardian for Sara Morozov a minor and Eleanna Morozov a minor,

Petitioners,

v.

GEORGE AND SONS' REPAIR SHOP, INC., D.B.A. "GEORGE'S TOWING;" and GEORGE ROSLER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Tenth Circuit affirmed the district court's entry of summary judgment in favor of an operator of a large truck who failed to deploy the required reflective warning signs after stopping in the traveled portion of I-70 resulting in the deaths of the occupants of a following vehicle. Without the required warning signs, the operator of the oncoming automobile was unable to perceive that the truck had stopped. In deciding that the issue of proximate cause need not be presented to the jury, the Tenth Circuit's decision conflicts with holdings of Seventh and Eleventh Circuits and the Colorado Supreme Court.

Thus, the question presented is:

State and federal laws require operators of large trucks to deploy reflective warning triangles whenever a truck is stopped upon the traveled portion of a highway. The triangles are intended to warn other motorists that the truck is stopped. Respondent and another gentleman stopped their trucks in a traveled portion of I-70 and admittedly failed to deploy warning triangles, despite having ample opportunity to do so. Thereafter an automobile collided with the rear of one of the trucks killing its occupants. Should a jury decide whether the failure to deploy warning triangles was a proximate cause of the accident?

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OPINION BELOW

The February 21, 2007 opinion of the United States Court of Appeals for the Tenth Circuit is unreported. *See* appendix A. The Tenth Circuit affirmed the unreported, March 30, 2006 decision of the United States District Court for the District of Colorado. *See* appendix B.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The United States Court of Appeals for the Tenth Circuit issued its Order and Judgment on February 21, 2007. *See* appendix A. On April 10, 2007, The United States Court of Appeals for the Tenth Circuit issued its Order denying the Petition for Rehearing. *See* appendix C. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

STATUTES AND REGULATIONS

Colo. Rev. Stat. § 42-4-230 Emergency lighting equipment - who must carry.

> (1) No motor vehicle carrying a truck license and weighing six thousand pounds or more and no passenger bus shall be operated over the highways of this state at any time without carrying in an accessible place inside or on the outside of the vehicle three bidirectional emergency reflective triangles of a type approved by the department, but the use of such equipment is not required in municipalities where there are street lights within not more than one hundred feet.

(2) Whenever a motor vehicle referred to in subsection (1) of this section is stopped upon the traveled portions of the highway for any cause other than necessary traffic stops, the driver of the stopped vehicle shall immediately activate the vehicular hazard warning signal flashers and continue the flashing until the driver places the bidirectional emergency reflective triangles as directed in subsection (3) of this section.

(3) Except as provided in subsection (2) of this section, whenever a motor vehicle referred to in subsection (1) of this section is stopped upon the traveled portion of a highway or the shoulder of a highway for any cause other than *necessary* traffic stops, the driver shall, as soon as possible, but in any event within ten minutes, place the bidirectional emergency reflective triangles in the following manner:

(a) One at the traffic side of the stopped vehicle, within ten feet of the front or rear of the vehicle;

(b) One at a distance of approximately one hundred feet from the stopped vehicle in the center of the traffic lane or shoulder occupied by the vehicle and in the direction of the traffic approaching in that lane; and

(c) One at a distance of approximately one hundred feet from the stopped vehicle in the opposite direction from

those placed in accordance with paragraphs (a) and (b) of this subsection (3) in the center of the traffic lane or shoulder occupied by the vehicle; or

(d) If the vehicle is stopped within five hundred feet of a curve, crest of a hill, or other obstruction to view, the driver shall place the emergency equipment required by this subsection (3) in the direction of the obstruction to view at a distance of one hundred feet to five hundred feet from the stopped vehicle so as to afford ample warning to other users of the highway; or

(e) If the vehicle is stopped upon the traveled portion or the shoulder of a divided or one-way highway, the driver shall place the emergency equipment required by this subsection (3), one at a distance of two hundred feet and one at a distance of one hundred feet in a direction toward approaching traffic in the center of the lane or shoulder occupied by the vehicle, and one at the traffic side of the vehicle within ten feet of the rear of the vehicle.

(4) No motor vehicle operating as a wrecking car at the scene of an accident shall move or attempt to move any wrecked vehicle without first complying with those sections of the law concerning emergency lighting.

49 C.F.R. § 392.22 Emergency signals; stopped commercial motor vehicles.

(a) Hazard warning signal flashers. Whenever a commercial motor vehicle is stopped upon the traveled portion of a highway or the shoulder of a highway for any cause other than necessary traffic stops, the driver of the stopped commercial motor vehicle shall immediately activate the vehicular hazard warning flashers and continue the flashing until the driver places the warning devices required by paragraph (b) of this section. The flashing signals shall be used during the time the warning devices are picked up for storage before movement of the commercial vehicle. The flashing lights may be used at other times while a commercial motor vehicle is stopped in addition to, but not in lieu of the warning devices required by paragraph (b) of this section.

(b) Placement of warning devices– (1) General rule. Except as provided in paragraph (b)(2) of this section, whenever a commercial motor vehicle is stopped upon the traveled portion or the shoulder of a highway for any cause other than necessary traffic stops, the driver shall, as soon as possible, but in any event within 10 minutes, place the warning devices required by § 393.95 of this subchapter, in the following manner:

(i) One on the traffic side and 4 paces (approximately 3 meters or 10 feet) from the stopped commercial motor vehicle in the direction of approaching traffic;

(ii) One at 40 paces (approximately 30 meters or 100 feet) from the stopped commercial vehicle in the center of the traffic lane or shoulder occupied by the commercial motor vehicle and in the direction of approaching traffic; and

(iii) One at 40 paces (approximately 30 meters or 100 feet) from the stopped commercial vehicle in the center of the traffic lane or shoulder occupied by the commercial motor vehicle and in the direction away from approaching traffic

(2) Special rules–(i) Fusees and liquid burning flares. The driver of a commercial motor vehicle equipped with only fusees or liquid-burning flares shall place a lighted fusee or liquid burning flare at each of the locations specified in paragraph (b)(1) of this section. There shall be at least one lighted fusee or liquid-burning flare at each of the prescribed locations, as long as the commercial motor vehicle is stopped. Before the stopped commercial motor vehicle is moved, the driver shall extinguish and remove each fusee or liquid-burning flare.

(ii) Daylight hours. Except as provided in paragraph (b)(2)(iii) of this section, during the period lighted lamps are not required, three bidirectional reflective triangles, or three lighted fusees or liquid-burning flares shall be placed as specified in paragraph (b)(1) of this

section within a time of ten minutes. In the event, the driver elects to use only fusees or liquid-burning flares in lieu of bidirectional reflective triangles or red flags, the driver must ensure that at least one fusee or liquid-burning flare remains lighted at each of the prescribed locations as long as the commercial motor vehicle is stopped or parked.

(iii) Business or residential districts. The placement of warning devices is not required within the business or residential district of a municipality, except during the time lighted lamps are required and when the street or highway lighting is insufficient to make a commercial motor vehicle clearly discernable at a distance of 500 feet to persons on the highway.

(iv) Hills, curves, and obstructions. If a commercial motor vehicle is stopped within 500 feet of a curve, crest of a hill, or other obstruction to view, the driver shall place the warning signal required by paragraph (b)(1) of this section in the direction of the obstruction to view a distance of 100 feet to 500 feet from the stopped commercial motor vehicle so as to afford ample warning to other users of the highway.

(v) Divided or one-way roads. If a commercial motor vehicle is stopped upon the traveled portion or the shoulder of a divided or one-way highway, the driver shall place the warning devices required by paragraph (b)(1) of this section, one warning device at a distance of 200 feet and one warning device at a distance of 100 feet in a direction toward approaching traffic in the center of the lane or shoulder occupied by the commercial motor vehicle. He/she shall place one warning device at the traffic side of the commercial motor vehicle within 10 feet of the rear of the commercial motor vehicle.

(vi) Leaking, flammable material. If gasoline or any other flammable liquid, or combustible liquid or gas seeps or leaks from a fuel container or a commercial motor vehicle stopped upon a highway, no emergency warning signal producing a flame shall be lighted or placed except at such a distance from any such liquid or gas as will assure the prevention of a fire or explosion.

49 C.F.R. § 392.8 Emergency equipment, inspection and use.

> No commercial motor vehicle shall be driven unless the driver thereof is satisfied that the emergency equipment required by Sec. 393.95 of this subchapter is in place and ready for use; nor shall any driver fail to use or make use of such equipment when and as needed.

STATEMENT OF THE CASE

Petitioners brought this negligence action, pursuant to 28 U.S.C. § 1332, after their relatives, Yevgeny Morozov and Alexander Bugaychuk, were killed when their vehicle crashed into the back of a semi-truck parked in an exit-only lane on Interstate 70 near Limon, Colorado.

On the morning of November 26, 2001, an Angel Express semi-truck driven by Jorge Lage became stuck on the shoulder of eastbound Interstate 70 in eastern Colorado. Respondent George & Sons Repair Shop ("Rosler") responded to a Colorado State Patrol request to tow Lage's truck back onto the highway. After towing Lage back onto the highway, Rosler unhooked his tow truck and asked Lage to follow him to the next exit to settle the bill. The two trucks traveled eastbound on Interstate 70 for approximately one mile, and then entered a third, exit-only lane leading to the exit. Neither driver placed emergency warning triangles on the highway beside or behind their vehicles, as required by both state and federal law.[1]

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1. *See* Colo. Rev. Stat. § 42-4-230; 49 C.F.R. § 392.22.

At some point after the two vehicles parked in the exit-only lane, a Budget Rent-A-Van driven by Yevgeny Morozov slammed into the back of the Angel Express semi-truck. Morozov and Bugaychuk both died as a result of their injuries.

Dmitruk filed suit against Angel Express in Washington State, and later filed suit against Rosler in United States District Court in Denver, Colorado. Dmitruk settled the Washington State lawsuit against Angel Express.

Rosler filed a motion for summary judgment. Dmitruk filed a cross-motion for summary judgment, arguing that Rosler had violated highway safety statutes and regulations in stopping in the I-70 right-of-way and in failing to deploy emergency warning triangles, and was therefore negligent as a matter of law. The district court agreed with Rosler in all respects, granting the motion and denying Dmitruk's cross-motion.

On review, a panel of the United States Court of Appeals for the Tenth Circuit undertook a de novo review of the district court's ruling on summary judgment. The panel concluded that, under Colorado law, Rosler's statutory violations may constitute negligence per se. But the panel further concluded that even assuming Rosler was negligent per se, the district court was correct in dismissing the Complaint because Dmitruk failed to present evidence that Rosler's negligence was a proximate cause of the accident.

REASONS FOR GRANTING THE PETITION

1. REVIEW IS WARRANTED TO RESOLVE A CONFLICT AMONG THE COURTS OF APPEALS CONCERNING THE APPLICATION OF THE SUMMARY JUDGMENT STANDARD TO CASES OF THIS NATURE

One of the principle purposes of certiorari jurisdiction is to bring about uniformity of decisions among the federal courts of appeals. Hence, a square and irreconcilable conflict ordinarily will secure review by this Court.[2]

This is not a case of first impression. Substantially similar cases have arisen in other circuits which determined that proximate cause was an issue for the jury, denying summary judgment to the defendants on that basis.

One such case was considered by the Eleventh Circuit which concluded that when a truck driver fails to activate emergency warning devices as required by law upon stopping on or near the highway, it is for the jury to decide whether such failure was the proximate cause of a subsequent collision, and the district court commits error in granting summary judgment based upon its finding that the failure to activate the emergency warning devices could not have proximately caused the collision.[3] Similarly, the Seventh Circuit concluded that material issues of fact preclude summary judgment dismissal where a trucker parks his

2. *See, e.g., McElroy v. United States*, 455 U.S. 642, 643 (1982); *Marks v. United States*, 430 U.S. 188, 189 (1977).

3. *First Tennessee Bank v. Wilson Freight Lines, Inc.*, 907 F.2d 1122 (11th Cir. 1990).

vehicle within the traveling lanes of a controlled access highway, as it is for the jury to decide whether the trucker should have foreseen that his actions created a significant hazard to approaching motorists.[4]

Each of these cases is squarely at odds with the decision of the Court of Appeals for the Tenth Circuit below, creating a circumstance of inconsistent results depending upon the circuit in which the case is pending. This could lead to forum shopping and procedural disputes over venue since the court below seemingly applied a different standard for summary judgment.

2. A CONFLICT BETWEEN THE COLORADO SUPREME COURT AND THE COURT OF APPEALS FOR THE TENTH CIRCUIT JUSTIFIES REVIEW BY THIS COURT.

Similar to the Seventh and Eleventh Circuits, the Colorado Supreme Court itself has considered a substantially similar case and reached a different result from the court below. In *Commercial Carriers, Inc. v. Driscoll Truck Lines, Inc.*,[5] the defendant carrier's tractor-trailer combination skidded on an icy highway at approximately 9 a.m. on a drizzly winter morning and came to stop partially blocking a lane of the highway in a visible location. The driver of the tractor-trailer failed to place emergency triangles behind the vehicle. The plaintiff was able to see the stopped tractor-trailer, but did not realize that it was stopped until it was too late to avoid a collision. The trial court found that the failure to place emergency triangles was the proximate cause of the

4. *Knoblauch v. Def. Express Corp.*, 86 F.3d 684 (7th Cir. 1996).

5. 408 P.2d 445 (Colo. 1965).

accident and, as a result, the plaintiff was not comparatively negligent. The appellate court agreed, holding that other drivers must be warned of a foreseeable road hazard through the use of warning flares or emergency triangles.

In the present case, Rosler violated both federal and state safety standards when he (1) parked his truck on the travelled portion of I70 to settle a tow bill and (2) failed to place emergency triangles behind his vehicle with adequate time to do so. The court below agreed this may constitute negligence per se, but nevertheless upheld the district court's ruling on summary judgment based on the failure to establish proximate cause.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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